

2013 PA Super 132

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
STELLA SLOAN,	:	
	:	
Appellant	:	No. 2043 WDA 2009

Appeal from the Judgment of Sentence entered on November 2, 2009 in the Court of Common Pleas of Allegheny County, Criminal Division, at No. CP-02-CR-0014095-2008

BEFORE: MUSMANNO, PANELLA, and STRASSBURGER,* JJ.

DISSENTING OPINION BY STRASSBURGER, J.: May 28, 2013

The Majority determines based upon the record before us that the Commonwealth failed to exercise due diligence in bringing Sloan’s case to trial. Because the trial court did not provide the Commonwealth an adequate opportunity to develop the record, this Court should remand the case for a new hearing. Therefore, I respectfully dissent.

On July 30, 2009, the trial court, with no Rule 600 motion before it, decided to “extend the speedy trial calendar for an additional 30 days” because the Commonwealth represented that it was ready to try the case on that very day although no trial had been scheduled. N.T., 7/30/2009, at 5. The trial court stated that its ruling was subject to Sloan’s later “raising the issue.” **Id.** Presumably that is why the trial court did not at that time require the Commonwealth to make a complete record of its diligence in

* Retired Senior Judge assigned to the Superior Court.

filing the criminal information or realizing that the pre-trial conference was scheduled to take place after the Rule 600 mechanical run date.

Sloan then did raise the issue by presenting a Rule 600 motion prior to trial. The trial court then inaccurately recalled that it had previously ruled on the motion and treated Sloan's motion as a motion for reconsideration. **See, e.g.,** N.T., 8/27/2009, at 3 ("Didn't the [c]ourt already rule on this matter?"); **id.** at 5 ("My recollection is the [c]ourt ruled since the Commonwealth was there and ready to proceed and that the Court could not proceed with the case at that moment, neither could defense counsel, Rule 600 was waived for that purpose."); **id.** at 6 ("Having already ruled on it are you asking me to reconsider that ruling?"). Based upon this mistake, the Commonwealth again did not have the chance to develop the record as to its diligence.

Because the burden is on the Commonwealth to establish that it exercised due diligence, **see, e.g., Commonwealth v. Bradford**, 46 A.3d 693, 702 (Pa. 2012), I would remand this case to the trial court for (1) a hearing on the Rule 600 motion at which the Commonwealth has the opportunity to establish what mechanisms it employed and steps it took in its efforts to have Sloan's trial scheduled before the mechanical run date, and whether any time is excusable or excludable; and (2) a subsequent trial court order and opinion addressing the evidence in light of the standard articulated by our Supreme Court in **Bradford**.

I also wish to emphasize that the trial court, both in the transcript and in its opinion, erred to the extent that it suggested that Sloan or her counsel had any responsibility to assist the Commonwealth in complying with Rule 600 by alerting it that the Rule 600 date was approaching. **See, e.g.**, N.T., 8/27/2009, at 11 (wherein the trial court addresses the following to Sloan's counsel: "if you had been assigned the case earlier, and the pretrial conference date had been listed, you couldn't necessarily sandbag the Commonwealth by not pointing that out. Speedy trial."); Trial Court Opinion, 7/13/2010, at 6 ("What is clear ... is that **both** of the parties and the Court system failed to perform the obligations placed upon them by law.") (emphasis added).

"It is clear that the burden of seeing that trial is commenced rests on the Commonwealth, **not the defendant.**" **Commonwealth v. Lynn**, 815 A.2d 1053, 1059 (Pa. Super. 2003) (quoting **Commonwealth v. McCutcheon**, 488 A.2d 281, 284 (Pa. Super. 1985)) (emphasis added). A defendant has no incentive to sabotage the Commonwealth's efforts to comply with Rule 600, as any delay caused by the defendant is excluded from the calculation, but he or she also certainly has no obligation to assist the Commonwealth's compliance with Rule 600 by reminding it of an approaching run date. Therefore, the trial court clearly erred to the extent that it placed any fault on the Public Defender's office for failing to alert the District Attorney's office of the upcoming mechanical run date.

J-S11008-11

Judgment Entered.

Nicholas V. Consetti

Deputy Prothonotary

Date: 5/28/2013